

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS  
SPRINGFIELD DIVISION

3:09-CV-10334-PBS

\* \* \* \* \*

GEOFFREY CROWTHER, \*

Plaintiff \*

V. \*

CSX TRANSPORTATION, INC., \*

and CONSOLIDATED RAIL CORP., \*

Defendants \*

\* \* \* \* \*

DEPOSITION OF: DR. MARTIN J. LUBER  
OFFICES OF NEW ENGLAND ORTHOPEDIC SURGEONS  
300 Birnie Avenue  
Springfield, Massachusetts 01107  
May 24, 2010, 5:30 p.m.

Michele L. Mariani  
Certified Shorthand Reporter  
BEACON HILL COURT REPORTING, INC.  
44 Bayswater Street  
Boston, Massachusetts 02128  
617.569.8050

**1 APPEARANCES:**2  
3**4 Representing the Plaintiff:**

5 **LAW OFFICE OF THOMAS J. JOYCE, III**  
 6 **900 Centerton Road**  
 7 **Mount Laurel, NJ 08054**  
 8 **BY: THOMAS J. JOYCE, III, ESQ.**  
 9 **856.914.0220 FAX 856.914.0429**  
 10 **EMAIL: tjoyce@tjoycelaw.com**

11  
12**13 Representing the Defendants:**

14 **FLYNN & WIRKUS, P.C.**  
 15 **400 Crown Colony Drive, Suite 200**  
 16 **Quincy, MA 02169**  
 17 **BY: HEATHER M. GAMACHE, ESQ.**  
 18 **617.773.5500 FAX 617.773.5510**  
 19 **EMAIL: hgamache@flynnwirkus.com**

20  
21  
22  
23  
24

Page 2

**1 (Deposition commenced at 5:26 p.m.)**2  
3

4 **DR. MARTIN LUBER, Deponent, Having first**  
 5 **been duly identified and sworn, testifies and**  
 6 **states as follows:**

7  
8**9 EXAMINATION BY MS. GAMACHE:**

10 **Q. Good -- I guess it's afternoon --**  
 11 **good afternoon, Dr. Luber. My name is Heather**  
 12 **Gamache. We met briefly before going on the**  
 13 **record. Have you been deposed before?**  
 14 **A. I have.**  
 15 **Q. So you're familiar with the**  
 16 **procedure, questions back and forth. Wait until**  
 17 **I finish the question before answering, and I'll**  
 18 **do the same for you. If you need a break at any**  
 19 **time, just let me know, that's fine. If at any**  
 20 **time you don't understand a question I'm asking,**  
 21 **just ask that I rephrase it, and I'd be happy to**  
 22 **do so. If you answer a question, I'm going to**  
 23 **presume that you knew or understood the question**  
 24 **that was being asked.**

Page 4

**1 I N D E X**2  
3**4 DEPONENT: DR. MARTIN J. LUBER**5  
6

7 **EXAMINATION BY: PAGE:**  
 8 **MS. GAMACHE 4**

9  
10**11 EXHIBITS: PAGE:**

12 **Exhibit 1, File .....6**  
 13 **Exhibit 2, Notice of Deposition .....6**  
 14 **Exhibit 3, CV of Dr. Luber .....6**  
 15 **Exhibit 4, Narrative Report, 4/26/10 ....6**  
 16 **Exhibit 5, CSX Job Description, 2 pgs. ..12**  
 17 **Exhibit 6, Office Note, 2/26/07 .....28**  
 18 **Exhibit 7, Office Note, 3/19/07 .....30**

19  
20**21 (Exhibit 1 retained by Dr. Luber.)**22  
23  
24

Page 3

**1 A. Understood.**

2 **Q. Are you on any medications today**  
 3 **that would compromise your ability to answer?**

4 **A. I am not.**

5 **Q. Okay. Did you bring your file with**  
 6 **you today?**

7 **A. I have files from our office, yes.**

8 **Q. Okay. Is that something that --**  
 9 **you can keep it, but something I'm going to mark**  
 10 **just the entire thing as an exhibit, and then**  
 11 **not alter it in any way from this point forward.**

12 **A. Okay, please.**

13 **Q. You can just mark the first page as**  
 14 **Exhibit 1, and then you can keep it in front of**  
 15 **you, and then just after the deposition, don't**  
 16 **make any changes to it, just keep it as is.**

17 **A. Understood.**

18 **Q. In your possession in the event**  
 19 **that this case goes to trial.**

20 **A. All right.**

21 **MS. GAMACHE: So we'll mark that as**  
 22 **Exhibit 1.**

23 **Q. (By Ms. Gamache) And also, you**  
 24 **received a notice of deposition, or Tom may have**

Page 5

1 received a notice of deposition.

2 A. I did.

3 MS. GAMACHE: I'm going to mark  
4 that as Exhibit 2, and mark these up to  
5 4.

6  
7 (Exhibit 1, File, Marked.)

8  
9 (Exhibit 2, Notice of Deposition,  
10 Marked.)

11  
12 (Exhibit 3, CV of Dr. Lubner,  
13 Marked.)

14  
15 (Exhibit 4, Narrative Report,  
16 4/26/10, Marked.)

17  
18 Q. (By Ms. Gamache) Dr. Lubner, I'm  
19 going to hand you what has been marked as  
20 Exhibit 3. It's your CV. If you can just take  
21 a look at that and confirm whether it's an up to  
22 date copy.

23 A. (Doctor looks over document.) It  
24 is not completely up to date. There's an

Page 6

1 additional board certification.

2 Q. What board certification is that?

3 A. I'm board certified in Sport's  
4 Medicine, and that was in 2007.

5 Q. If you could provide Mr. Joyce with  
6 an updated copy of your CV, then he can get that  
7 to me, that would be great.

8 A. I can do that.

9 Q. And what's been marked as Exhibit  
10 4 is the narrative report you prepared?

11 A. In April of this year, yes.

12 Q. And that's an accurate copy of the  
13 report you prepared?

14 A. Yes.

15 Q. Okay. Dr. Lubner, what is your date  
16 of birth?

17 A. March 16th, 1968.

18 Q. And what is -- the address here is?

19 A. 300 Birnie Avenue, Springfield.

20 Q. And that's the location of your  
21 office, correct?

22 A. Correct.

23 Q. Where did you attend college?

24 A. Loyola University in Chicago.

Page 7

1 Q. What year did you graduate?

2 A. 1990.

3 Q. And where did you attend medical  
4 school?

5 A. SUNY Upstate in Syracuse.

6 Q. And what year did you graduate?

7 A. 1994.

8 Q. And we were just talking about your  
9 board certification. And you're board certified  
10 in Sport's Medicine, and you received that in  
11 2007, correct?

12 A. Correct.

13 Q. Are you board certified in any  
14 other areas?

15 A. Orthopedic Surgery.

16 Q. When did you receive your board  
17 certification in Orthopedic Surgery?

18 A. 2003.

19 Q. And both certifications are up to  
20 date?

21 A. They are.

22 Q. Have you ever been suspended --  
23 have your certifications ever been suspended in  
24 any way?

Page 8

1 A. No.

2 Q. Altered?

3 A. No.

4 Q. Has any disciplinary action ever  
5 been taken against you?

6 A. No.

7 Q. Okay. Have you authored any  
8 papers or conducted any research?

9 A. I have. They're listed in my CV.

10 Q. Are any of them related to  
11 repetitive stress injuries?

12 A. They are not.

13 Q. Is it your understanding that  
14 you've been retained as an expert by Mr. Joyce  
15 in this case?

16 A. I don't believe that I have been.

17 I believe I've been retained as a witness of  
18 fact for the services I provided for  
19 Mr. Crowther.

20 Q. Okay. So were you paid for your  
21 narrative report?

22 A. I believe that I was, yes.

23 Q. Have you served as an expert  
24 witness in the past?

Page 9

<p>1 A. I have not.</p> <p>2 Q. Have you testified in court before?</p> <p>3 A. No.</p> <p>4 Q. But you said you've given prior</p> <p>5 depositions?</p> <p>6 A. Yes.</p> <p>7 Q. What were those in connection</p> <p>8 with?</p> <p>9 A. Care rendered to patients.</p> <p>10 Q. On a fact witness basis?</p> <p>11 A. Yes.</p> <p>12 Q. Were they personal injury cases, or</p> <p>13 medical malpractice cases, if you know?</p> <p>14 A. Personal injury cases.</p> <p>15 Q. Okay. Do you have any connection</p> <p>16 to the railroad industry?</p> <p>17 A. I do not.</p> <p>18 Q. And referring back your report or</p> <p>19 your narrative report, does your narrative</p> <p>20 report contain all of your opinions with regard</p> <p>21 to Mr. Crowther's condition?</p> <p>22 A. It contains my opinion regarding</p> <p>23 the injury that I treated him for regarding his</p> <p>24 left elbow.</p> <p style="text-align: right;">Page 10</p>	<p>1 related to Mr. Crowther's job duties at the</p> <p>2 railroad?</p> <p>3 A. I did.</p> <p>4 Q. What documents did you review?</p> <p>5 A. I had a listing of the job</p> <p>6 description that he provided for or while on the</p> <p>7 job at the railroad.</p> <p>8 Q. Do you have a copy of that?</p> <p>9 A. I don't currently in my possession.</p> <p>10 MR. JOYCE: I do. Do you want what</p> <p>11 I sent to him, Heather?</p> <p>12 MS. GAMACHE: Yes, that would be</p> <p>13 great.</p> <p>14 MR. JOYCE: I sent two. I sent him</p> <p>15 the actual trackman.</p> <p>16 MS. GAMACHE: Yeah, I'm going to</p> <p>17 mark them as exhibits. We can mark them</p> <p>18 as Exhibit 5.</p> <p>19</p> <p>20 (Exhibit 5, CSX Job Description,</p> <p>21 2 pgs., Marked.)</p> <p>22</p> <p>23 Q. (By Ms. Gamache) Take a look at</p> <p>24 those, and let me know if those are the</p> <p style="text-align: right;">Page 12</p>
<p>1 Q. Okay. And what did you review to</p> <p>2 prepare your report?</p> <p>3 A. Mr. Crowther's office notes from</p> <p>4 New England Orthopedics, his x-rays, his CT</p> <p>5 scan, and my operative reports from his</p> <p>6 subsequent surgery.</p> <p>7 Q. When you say his New England</p> <p>8 Orthopedic Surgeons, is that correct?</p> <p>9 A. Correct, Surgeons.</p> <p>10 Q. Office notes, those are his entire</p> <p>11 record from the office, including the other</p> <p>12 treating physicians?</p> <p>13 A. I reviewed the records regarding</p> <p>14 his left elbow. He was originally seen by</p> <p>15 Dr. Wenner, subsequently, I believe, by</p> <p>16 Dr. Adler, and then referred on to myself for</p> <p>17 final treatment of his left elbow.</p> <p>18 Q. So the records related to the left</p> <p>19 elbow, but not necessarily the records related</p> <p>20 to his other conditions?</p> <p>21 A. I am aware of his other surgeries</p> <p>22 and services provided here, but I did not study</p> <p>23 them.</p> <p>24 Q. Okay. Did you review any documents</p> <p style="text-align: right;">Page 11</p>	<p>1 documents you reviewed.</p> <p>2 A. (Doctor looks over documents.)</p> <p>3 Yes, these are what I reviewed when preparing</p> <p>4 his narrative report.</p> <p>5 Q. Do you mind if I take a look at</p> <p>6 them real quick.</p> <p>7 Other than the medical records from</p> <p>8 your office, the entire NEOS office, did you</p> <p>9 review any outside medical records?</p> <p>10 A. No.</p> <p>11 Q. And other than the two documents</p> <p>12 provided to you by Mr. Joyce, the CSX Position</p> <p>13 Information document, did you review any other</p> <p>14 documents related to Mr. Crowther's job duties?</p> <p>15 A. No.</p> <p>16 Q. Did you have any conversations with</p> <p>17 Mr. Crowther regarding his job duties?</p> <p>18 A. Not that I recall.</p> <p>19 Q. So you don't recall discussing his</p> <p>20 job with him while you were treating him?</p> <p>21 A. We did in terms of his abilities to</p> <p>22 return to work after the fact. I don't recall</p> <p>23 any specific other descriptions or conversations</p> <p>24 regarding his job duties, and how they would</p> <p style="text-align: right;">Page 13</p>

1 pertain to his left elbow.

2 Q. When you say after the fact, are  
3 you referring to after the surgery, his left  
4 elbow surgery?

5 A. No. When we first treated him,  
6 when I first treated him in 2007, we did  
7 describe how his left elbow pain was associated  
8 with, or at least brought upon by his working,  
9 i.e., when he worked, he would have elbow pain.  
10 And after his elbow surgery, we did discuss how  
11 it might impact his ability to return to work.

12 Q. Okay. And so am I correct that you  
13 don't recall having any conversations with him  
14 regarding tools that he used, or the way in  
15 which he held the tools, or anything of that  
16 nature?

17 A. I don't recall.

18 Q. Okay. Did you rely on any  
19 literature in reaching your opinion that's in  
20 the narrative report?

21 A. In my -- the literature I reviewed  
22 for my general education and how I provide  
23 orthopedic services, but not specifically an  
24 article directly related to Mr. Crowther's

Page 14

1 There was a description of swinging a hammer,  
2 using tie bars. I'm not sure where I remember  
3 that from. If I can just review this.

4 Q. Sure. Take a moment.

5 A. (Doctor looks over document.)

6 I mean, it's repetitive use of his left upper  
7 extremity often with very heavy loads, and  
8 again, the repetitive nature, that's the most  
9 important.

10 Q. The repetitive nature of using any  
11 specific tool or?

12 A. Any specific tool can lead to  
13 degenerative change, but it's the heavy  
14 unloading, loading, track materials, cutting  
15 rails, aligning tie plates, repairing and  
16 adjusting track switches, you know, cutting the  
17 brush from the vegetation for the right of way.  
18 I mean, all that involves repetitive, and my  
19 understanding, heavy work, manual labor.

20 Q. And further down in the same  
21 paragraph, you say -- you indicate, "To a  
22 reasonable degree of medical certainty, I  
23 believe that Mr. Crowther's work habits as  
24 described to me, and available from description

Page 16

1 elbow.

2 Q. Thank you. I just want to refer to  
3 your report a minute. I'm going to ask you some  
4 specific questions about your opinion.

5 On the second page, the first or  
6 second paragraph, you say you have had the  
7 opportunity to review the work requirements of  
8 Mr. Crowther's job at CSX. "I believe that  
9 Mr. Crowther's repetitive use of his left upper  
10 extremity, including lifting, carrying,  
11 hammering, etc., is in fact a direct cause if  
12 not an exacerbating feature of the development  
13 of left elbow degenerative osteoarthropathy."  
14 Did I say that correctly?

15 A. Yes.

16 Q. If you want to take a look at these  
17 again, what specifically are you referring to  
18 when you say work requirements? I mean, you  
19 have etc. on there, so lifting, carrying,  
20 hammering, etc. What would be the etc.?

21 A. Well, I mean, the description of  
22 his job that includes drilling holes through  
23 rails, inserting and tightening loose bolts.  
24 There's also a description of manual labor.

Page 15

1 by CSX Industries, would in fact increase the  
2 likelihood that Mr. Crowther would develop  
3 degenerative osteoarthropathy of his left elbow  
4 and result in mechanical symptoms associated  
5 with loose bodies."

6 When you refer to work habits, what  
7 are you referring to, that is different from his  
8 work requirements? How is habit different than  
9 requirement?

10 A. I don't believe that they are.  
11 Different choice of words.

12 Q. So you're using habit and  
13 requirement synonymously?

14 A. Yes.

15 Q. Okay. And you testified earlier  
16 that you did not speak, or you don't recall a  
17 specific conversation with Mr. Crowther  
18 regarding work habits?

19 A. I don't recall a specific  
20 conversation, no.

21 Q. Okay. So in preparing your  
22 narrative, you didn't speak to Mr. Crowther  
23 beforehand in preparation to prepare the  
24 narrative?

Page 17

1 A. No.

2 Q. Is it your opinion that

3 Mr. Crowther's work, his normal every day work  
4 on the railroad could cause or contribute to the  
5 degenerative changes that he was suffering from  
6 in his left elbow?

7 A. It is.

8 Q. You have not given an opinion, am I  
9 correct, whether or not anything separate and  
10 aside from those daily work habits -- I'm sorry,  
11 let me rephrase that.

12 Would you agree that any activity  
13 could, any repetitive activity at work could  
14 cause the degenerative condition that he was  
15 suffering from?

16 A. I think any repetitive work could  
17 increase the likelihood of developing arthritis,  
18 yes.

19 Q. So you have not provided an opinion  
20 regarding whether there was something -- whether  
21 the position, he was holding something, or the  
22 specific work that he was doing, whether there  
23 was anything wrong with it, just simply that he  
24 was doing it?

Page 18

1 A. Correct.

2 Q. So you have not given an opinion  
3 regarding whether CSX could have done something  
4 differently to prevent Mr. Crowther from  
5 developing a degenerative condition?

6 MR. JOYCE: Dr. Lubner is not our  
7 liability expert, he's simply a medical  
8 causation expert, so we're not offering an  
9 unsafe work place, if that's what you  
10 mean.

11 MS. GAMACHE: I understand. I'm  
12 just confirming that he's not providing an  
13 opinion, he's simply saying the repetitive  
14 activity at work caused or at least  
15 contributed to the degenerative changes.

16 MR. JOYCE: Okay.

17 MS. GAMACHE: Is that correct?

18 THE WITNESS: Correct.

19 Q. (By Ms. Gamache) Would you agree  
20 that there are other activities can cause  
21 degenerative changes in the elbow?

22 A. Yes.

23 Q. What types of activities can cause  
24 degenerative changes?

Page 19

1 A. Overhead throwing for many years is  
2 a prime cause of degenerative change. Frankly,  
3 any repetitive use of a limb can lead to  
4 degenerative arthritis.

5 Q. Is age a factor?

6 A. Age is not the sole cause of  
7 degenerative change, but as we age, the  
8 likelihood of seeing arthritis increases.

9 Q. Okay. Genetics, is that ever a  
10 factor?

11 A. It appears to be. Not yet proven.

12 Q. You've also given an opinion that  
13 Mr. Crowther's employment or employment  
14 activities exacerbated his degenerative changes.  
15 What do you mean by exacerbated?

16 A. I mean, likely led to an  
17 acceleration of degenerative arthritis  
18 developing.

19 Q. Is it your opinion that  
20 Mr. Crowther's condition would have developed  
21 more quickly if he continued to work beyond the  
22 date that he stopped working?

23 A. If he were continuing to engage in  
24 repetitive behaviors as described in the CSX

Page 20

1 documents I reviewed, I would have expected his  
2 arthritis to have increased after the period of  
3 time he stopped working.

4 Q. Would you agree that any activity  
5 can exacerbate degenerative changes, any  
6 repetitive activity with your arm?

7 A. Any repetitive activity,  
8 particularly heavy activity, can increase and  
9 accelerate it, yes.

10 Q. But any activity, it doesn't  
11 necessarily have to be heavy?

12 A. While not statistically proven,  
13 there does appear to be an increased rate of the  
14 development of arthritis in heavier activity as  
15 opposed to lighter activities done repetitively,  
16 such as clerical work.

17 Q. What about activities that are not  
18 related to work, such as leisure activities?

19 A. As I mentioned, yes, baseball  
20 players seem to have an increased risk of  
21 degenerative elbow conditions.

22 Q. Would activities such as swimming  
23 increase the chance of degenerative -- or  
24 exacerbate degenerative changes in the elbow?

Page 21

<p>1 A. I have not seen that personally or 2 described in the literature. 3 Q. How about fly fishing? 4 A. Fly fishing is in some degree 5 repetitive with casting. It would depend upon 6 which arm, I guess, you casted with. 7 Q. And I'm not sure if it's in your 8 record -- it's probably somewhere in your 9 records that Mr. Crowther is right hand 10 dominant, correct? 11 A. I'd have to review my records. If 12 that is accurate, I don't know that. 13 Q. I can represent to you that he's 14 right hand dominant. 15 A. Fine. 16 Q. And this injury was his left 17 elbow, correct? 18 A. Correct. 19 Q. Is there -- do you have any 20 objective scientific evidence that 21 Mr. Crowther's work activities were exacerbated 22 by -- oh, I'm sorry, Mr. Crowther's elbow 23 disease process was exacerbated by his work 24 activities?</p> <p style="text-align: right;">Page 22</p>	<p>1 MR. JOYCE: Objection. You can 2 answer. 3 THE WITNESS: Not necessarily, 4 because those are tendonopathies, which 5 are different from mechanical locking 6 episodes associated with arthritis, which 7 is what I treated him for. 8 Q. (By Ms. Gamache) Is it possible 9 that he was experiencing degenerative changes in 10 2002 and suffering pain from them at the same 11 time he was presenting -- I mean, he was 12 presenting for pain in 2002, and ultimately 13 diagnosed with the conditions I just spoke 14 about. Is it possible that he was also 15 suffering from degenerative changes in 2002? 16 MR. JOYCE: Objection. 17 THE WITNESS: It is possible, but I 18 did not treat him for it, nor did I exam 19 him, so I can't speak to accuracy of the 20 physician who made that diagnosis in 2002. 21 Q. (By Ms. Gamache) Okay. Is medial 22 epicondylitis in any way indicative of 23 degenerative changes? 24 A. No.</p> <p style="text-align: right;">Page 24</p>
<p>1 A. No. 2 Q. Do you have an opinion regarding 3 when Mr. Crowther became symptomatic, when his 4 left elbow became symptomatic? 5 A. He first complaint of it to 6 Dr. Wenner, who was treating him for or seeing 7 him for his hand, I believe in 2006 or 2007. 8 He was referred to me in 2007. That was the 9 first knowledge I had of his complaints. 10 Q. In general, in your opinion, when 11 does a patient become symptomatic? 12 A. Well, I mean, I would relate being 13 symptomatic to having enough complaints to seek 14 out medical care for. 15 Q. Were you aware of Mr. Crowther 16 seeking out medical attention prior to 2006? 17 A. I am not. 18 Q. If I represent to you that 19 Mr. Crowther sought medical attention in 2002 20 for elbow pain, and was diagnosed with bilateral 21 medial epicondylitis, as well as tennis elbow 22 and cubital tunnel, would that change when you 23 believe he became symptomatic for the disease 24 process in his left elbow?</p> <p style="text-align: right;">Page 23</p>	<p>1 Q. Is Cubital Tunnel Syndrome in any 2 way indicative of degenerative changes? 3 A. Not necessarily. 4 Q. In what way would it be indicative 5 of degenerative changes? 6 A. There is a condition called Tardy 7 Ulnar Nerve Palsy, which is Cubital Tunnel 8 Syndrome, which develops years after a 9 fracture. It usually is associated with 10 significant loss of motion. But those are 11 different than Mr. Crowther's elbow, which had 12 range of motion with mechanical locking 13 episodes, so different disease process. 14 Q. Have you treated other railroad 15 workers with a similar condition? 16 A. I have not. 17 Q. Is the degenerative condition that 18 Mr. Crowther suffers from in his left elbow, is 19 that a common condition? 20 A. Elbow arthritis is relatively 21 uncommon. 22 Q. Do you treat other railroad 23 workers, in general? 24 A. I have seen other railroad</p> <p style="text-align: right;">Page 25</p>

1 workers. I don't have a large percentage of  
2 them in my practice.

3 Q. The ones that you have seen, do you  
4 know whether they have the same position or type  
5 of position that Mr. Crowther had?

6 A. I do not know that for a fact.

7 Q. Okay. Is there any way to  
8 determine the actual cause of the degenerative  
9 condition?

10 A. No, not to my knowledge. Could I  
11 rephrase that?

12 Q. Sure.

13 A. It is more likely that you will  
14 develop degenerative change after an  
15 intra-articular fracture. So if we have a  
16 fracture in the knee, it's more likely to  
17 develop degenerative change later, but it's a  
18 different condition, so.

19 Q. Are you aware of Mr. Crowther  
20 suffering from any intra-articular fracture in  
21 any way?

22 A. Not that I'm aware of.

23 Q. So to diagnose a degenerative  
24 condition, you would assess symptoms, and then

Page 26

1 conduct tests, and make a diagnosis; is that  
2 generally --

3 A. Yes.

4 Q. I'm going to refer to a couple  
5 medical records, they're probably in your  
6 notes. You indicated that you first saw  
7 Mr. Crowther -- or actually, I'm not sure if we  
8 covered exactly when you saw him. You said in  
9 2007, if I'm correct. Do you recall that being  
10 when you initially saw Mr. Crowther?

11 A. I believe that was the first  
12 referral to me. I actually do not have that  
13 office note in front of me.

14 Q. Okay. I can give you one.

15 MR. JOYCE: This is February 26th,  
16 2007?

17 MS. GAMACHE: Yes. You can ignore  
18 my highlighting.

19 Q. (By Ms. Gamache) Take a moment  
20 and look at the note.

21 A. Thank you.

22 Q. That's not included in the packet  
23 you have?

24 A. It's not included in the packet

Page 27

1 that I have in front of me.

2 MS. GAMACHE: Then we'll that as an  
3 exhibit, as well.

4  
5 (Exhibit 6, Office Note, 2/26/07,  
6 Marked.)

7  
8 Q. (By Ms. Gamache) Now, referring  
9 back to what was marked as Exhibit 6, is that  
10 your office note dated February 26th, 2007?

11 A. It is.

12 Q. In your office note, it indicates  
13 in the first paragraph, "Since he has been  
14 relatively inactive, his left elbow has become  
15 relatively asymptomatic for him;" is that  
16 correct?

17 A. Yes.

18 Q. So at the time you saw him -- at  
19 the time that you saw Mr. Crowther, was he --  
20 what were his symptoms, if you've written  
21 relatively asymptomatic?

22 A. He was really having little or no  
23 symptoms, because, again, recent surgery with  
24 Dr. Cowan and separately with Dr. Wenner, he

Page 28

1 hadn't been using his arm very much.

2 Q. And that, based on the records, was  
3 the first time that you saw --

4 A. That was the first time I was asked  
5 to see him, yes.

6 Q. Okay. Do you recall, at any point  
7 after seeing Mr. Crowther for the first time on  
8 February 26th, 2007, his condition worsening,  
9 his left elbow condition?

10 A. Not until he returned to me in, I  
11 believe it was 2009, when he was experiencing  
12 more mechanical episodes in his left elbow.

13 Q. Would you consider that to be an  
14 aggravation or exacerbation of his condition  
15 from when you saw him on February 26th, 2007?

16 A. Yes. As I outlined in that  
17 original note, the reason to do surgery would be  
18 based upon whether or not he was having  
19 mechanical locking episodes.

20 Q. I'm going to refer you to a note  
21 dated March 19th, 2007.

22 A. I don't have that, as well.

23 Q. Okay. That's fine.

24 A. (Doctor looks over document.)

Page 29



1 MS. GAMACHE: That will be  
2 Exhibit 7.

3  
4 (Exhibit 7, Office Note, 3/19/07,  
5 Marked.)  
6

7 Q. (By Ms. Gamache) And again, in  
8 this note, March 19th, 2007, you indicate,  
9 "Today, he has relatively few symptoms because,  
10 again, his work habits have changed," correct?

11 A. Yes.

12 Q. Would you agree that similar to  
13 February 26, 2007, at the time you saw him on  
14 March 19th, 2007, he was asymptomatic?

15 A. Yes. The main reason for his visit  
16 was to follow-up on his CT scan that I had  
17 ordered. Could I clarify an error I see in my  
18 note?

19 Q. Sure.

20 A. In the "Impression," I list left  
21 knee loose bodies, and left knee capitellar, and  
22 that should be elbow.

23 Q. Okay. I was going to ask you that,  
24 actually. Thank you.

Page 30

1 had bilateral total knee arthroplasty with  
2 Dr. Laymen . I never treated him for his knee.

3 Q. Okay. Although that's in one  
4 sentence, when you say he has been having  
5 ongoing mechanical symptoms and discomfort, are  
6 you referring, then, to his knee or his elbow?

7 A. To his elbow.

8 Q. And I believe you testified earlier  
9 that that would be -- that based on the times  
10 you saw him in February of 2007 and March of  
11 2007, that in January of 2009, he is no longer  
12 asymptomatic, and is now --

13 A. Having symptoms.

14 Q. -- having symptoms?

15 A. That has brought him back to seek  
16 care, yes.

17 Q. And I believe you testified that  
18 that was an aggravation of his condition?

19 A. At least his symptoms were enough  
20 that he cycled back to seek care again regarding  
21 his left elbow.

22 Q. If I represent to you that  
23 Mr. Crowther did not work at all between when  
24 you saw saw him in 2007 to 2009, is it safe to

Page 32

1 MR. JOYCE: You didn't treat him  
2 for his left knee, right, Doctor?

3 THE WITNESS: I did not. That was  
4 an error.

5 Q. (By Ms. Gamache) And now I'm going  
6 to refer you to a note dated January 19th, 2009,  
7 which I believe, based on the records, is the  
8 next visit you had with Mr. Crowther, which is  
9 22 months later.

10 A. Yes. And again, I said knee, it is  
11 elbow. I apologize for that.

12 Q. Okay. In both places? It's also  
13 in the second paragraph?

14 A. Yes. It is always his elbow.

15 Q. So if, in the records, it says  
16 Dr. Luber and relates to the knee, is it safe to  
17 presume that you're referring to the elbow?

18 A. I am sorry to admit this, that it  
19 is safe to assume that I spoke in error.

20 Q. In this record, you indicate, "He  
21 has been having ongoing mechanical symptoms and  
22 discomfort as he is recovering from bilateral  
23 total -- which says knee, but should be elbow --

24 A. No, I'm sorry. So he has recently

Page 31

1 state that conditions, other than his work, were  
2 aggravating his condition?

3 MR. JOYCE: Objection.

4 THE WITNESS: I'm answering?

5 MR. JOYCE: Yes.

6 THE WITNESS: Other things may have  
7 exacerbated his elbow at that time, yes.

8 Q. (By Ms. Gamache) I'm going to  
9 refer you back to the February 26th, 2007  
10 record.

11 A. Yes.

12 Q. That was the first day that you  
13 that treated Mr. Crowther. On that date, based  
14 on the elbow -- based on the condition of the  
15 elbow, would you have considered him unable to  
16 work, simply referring to the elbow condition,  
17 not any other condition he was suffering from?

18 A. That question wasn't posed to me at  
19 that time. I would have assumed that he could  
20 be able to work, given the way his elbow  
21 appeared on that date.

22 Q. Okay. And based on his condition  
23 on that date, would you have considered him able  
24 to work at full capacity?

Page 33

1 A. Well, that's difficult to  
2 determine, because I don't know how symptomatic  
3 he would have been were he working at full  
4 capacity; meaning, that in an inactive state, he  
5 was not complaining of elbow pain, but if he  
6 were at work full duty, would his elbow have  
7 been worse? I don't have that answer.

8 Q. At any point, when you were  
9 treating Mr. Crowther, did you give him an  
10 opinion regarding whether or not he could work  
11 based on the condition of his elbow?

12 A. I don't recall doing so. I don't  
13 know if there are records to indicate a work  
14 note regarding his left elbow during my course  
15 of treatment with him.

16 Q. Okay. I'm going to refer to,  
17 again, back to the February 26th, 2007 record.  
18 On the second sentence, it states, "He has had  
19 complaints of left elbow pain and some  
20 mechanical symptoms for the past several years."  
21 Would Mr. Crowther have provided that  
22 information to you?

23 A. That would be the likely source of  
24 that, if it's in that section of the note, which

Page 34

1 is related to what the patient tells me upon  
2 arrival

3 Q. Okay. And that's information that  
4 you take down, or someone else takes down?

5 A. That I take down.

6 Q. Okay. And when you say past  
7 several years, is that more than one year?

8 A. It is certainly non-specific, but  
9 it would be more than one year.

10 Q. Is it more than two years?

11 A. I don't know. Several would  
12 usually mean more than two.

13 MS. GAMACHE: Okay. I'm going to  
14 take a minute and review any notes, Tom.

15 MR. JOYCE: Sure.

16 Q. (By Ms. Gamache) Going back to  
17 when you prepared your narrative report, you  
18 indicated that you referred to what's been  
19 marked as Exhibit 5, which were job  
20 descriptions. Did you assess any activity  
21 versus rest period, as far as manual labor, and  
22 how Mr. Crowther's job duties would have caused  
23 or contributed to his degenerative condition?

24 A. No.

Page 35

1 Q. So you didn't speak to him or  
2 assess any percentage, if he's doing manual  
3 work, this percentage of time versus resting it  
4 percentage of the time?

5 A. I did not.

6 Q. Have you ever visited a job site  
7 where individuals doing what Mr. Crowther did in  
8 his work duties were doing?

9 A. No.

10 Q. Also looking at your report, on the  
11 second page, in the second to last paragraph,  
12 you indicate, "At this time, I believe that to a  
13 reasonable degree of medical certainty that  
14 Mr. Crowther's left elbow injury was exacerbated  
15 and aggravated, and at least partially caused by  
16 his work history at CSX Transportation."

17 What other causes, in your opinion  
18 -- or I'm sorry, what else, other than his work,  
19 caused his degenerative condition?

20 A. Without certain knowledge, but  
21 there is a suggestion in his original CT scan  
22 that he might have had an old osteochondritis  
23 dissecans lesion on his capitellum.

24 Q. And can you tell, based -- I'm

Page 36

1 sorry, you said it was a CT scan, correct?

2 A. Correct.

3 Q. Based on the CT scan, is it  
4 possible to determine how long it had been  
5 there?

6 A. No, but they generally develop in  
7 adolescence.

8 Q. And what is it, if you can say it  
9 again?

10 A. Osteochondritis Dissecans.

11 Q. OCD is how it is commonly referred  
12 to?

13 A. Correct.

14 Q. And what is OCD?

15 A. It is a poorly understood injury to  
16 the blood supply of a growth plate that leads to  
17 a disruption of that blood supply, and then a  
18 resulting injury to the underlying bone that  
19 supports the cartilage.

20 Q. I'm going to refer you to the CT of  
21 the left elbow dated March 8th, 2007.

22 MS. GAMACHE: We can mark that as  
23 exhibit --

24 THE WITNESS: It's in my file.

Page 37

<p>1 MS. GAMACHE: Oh, it's in your</p> <p>2 file. We don't need to mark it as an</p> <p>3 exhibit, then.</p> <p>4 Q. (By Ms. Gamache) And the OCD that</p> <p>5 you're referring to was visible on the CT scan,</p> <p>6 correct?</p> <p>7 A. Correct.</p> <p>8 Q. Okay.</p> <p>9 A. Well, it can't be confirmed to be</p> <p>10 an OCD lesion, but that is the most likely</p> <p>11 diagnosis that would be associated with the</p> <p>12 radiographic abnormalities seen on the CT scan.</p> <p>13 Q. And it's possible that the OCD</p> <p>14 caused Mr. Crowther's degenerative condition?</p> <p>15 MR. JOYCE: Objection.</p> <p>16 THE WITNESS: It is possible that</p> <p>17 the OCD lesion was a contributing factor</p> <p>18 to his development of arthritis.</p> <p>19 Q. (By Ms. Gamache) Is there any way</p> <p>20 to determine whether one contributing factor,</p> <p>21 whether it's the OCD or Mr. Crowther's job</p> <p>22 duties, caused or contributed more to the</p> <p>23 development of his degenerative condition?</p> <p>24 MR. JOYCE: Objection.</p> <p style="text-align: right;">Page 38</p>	<p>1 condition, it develops over time?</p> <p>2 A. Correct.</p> <p>3 Q. Is there any way to determine,</p> <p>4 based on the CT or any other type of test, how</p> <p>5 long those loose bodies or spurs were present in</p> <p>6 Mr. Crowther's elbow?</p> <p>7 A. No, other than following serial</p> <p>8 radiographs.</p> <p>9 Q. Did you have any other scans, other</p> <p>10 than this one, which was taken on March 8th,</p> <p>11 2007?</p> <p>12 A. No. Dr. Wenner, I believe,</p> <p>13 obtained the original elbow x-rays, which led to</p> <p>14 his referral the year before that, or at some</p> <p>15 point prior to that 2007 CT scan.</p> <p>16 Q. And would the x-ray provide the</p> <p>17 same information that the CT scan would?</p> <p>18 A. Yes, but in less detail.</p> <p>19 Q. Other than the OCD, are there any</p> <p>20 other factors which could have caused or</p> <p>21 contributed to Mr. Crowther's degenerative</p> <p>22 condition?</p> <p>23 A. I don't understand the question.</p> <p>24 Q. In your opinion, you've opined in</p> <p style="text-align: right;">Page 40</p>
<p>1 THE WITNESS: I don't believe</p> <p>2 that's possible.</p> <p>3 Q. (By Ms. Gamache) I'm going to</p> <p>4 refer you again to the CT scan. What, in</p> <p>5 addition to OCD, did the CT scan reveal?</p> <p>6 A. Again, degenerative spurring, and</p> <p>7 multiple intra-articular loose bodies.</p> <p>8 Q. If you don't mind, explain briefly</p> <p>9 what spurring is.</p> <p>10 A. In any joint that is undergoing</p> <p>11 osteoarthritic change, and therefore, the loss</p> <p>12 of cartilage on the end of the joint surfaces,</p> <p>13 the most common response in the body is to make</p> <p>14 osteophytes or bone spurs at the margins or</p> <p>15 edges of those joints. In the elbow, those bone</p> <p>16 spurs often cause limited range of motion.</p> <p>17 Q. And then loose bodies?</p> <p>18 A. Loose bodies are found in a joint</p> <p>19 for various reasons, but most commonly during</p> <p>20 the development of degenerative arthritis,</p> <p>21 pieces of cartilage are damaged or flaked off or</p> <p>22 loosened, and they grow over time, much like a</p> <p>23 pearl does, and get larger.</p> <p>24 Q. So this type of arthritic</p> <p style="text-align: right;">Page 39</p>	<p>1 your narrative report that Mr. Crowther's work</p> <p>2 activities contributed or caused his</p> <p>3 degenerative condition, and you've also just</p> <p>4 testified that the OCD could have caused or</p> <p>5 contributed to his condition in his left elbow.</p> <p>6 Is it your opinion that any -- that</p> <p>7 there is another potential cause of the</p> <p>8 condition in his elbow?</p> <p>9 A. I believe that his osteochondritis</p> <p>10 dissecans was a contributing factor that was</p> <p>11 exacerbated by the repetitive use of his arm,</p> <p>12 inactivities, particularly the work activities</p> <p>13 that I was provided with.</p> <p>14 Q. Could Mr. Crowther have developed</p> <p>15 this type of degenerative condition without</p> <p>16 having performed manual labor?</p> <p>17 A. Possibly.</p> <p>18 Q. Is there any way to determine --</p> <p>19 strike that.</p> <p>20 Is it possible for the OCD lesion</p> <p>21 to have caused Mr. Crowther pain over the course</p> <p>22 of its development?</p> <p>23 A. They are often asymptomatic, and</p> <p>24 they're only brought to our attention</p> <p style="text-align: right;">Page 41</p>

1 theoretically years after they've develop, but  
2 they do occasionally cause symptoms early on in  
3 their development.

4 Q. And what type of symptoms would  
5 show up?

6 A. They can cause pain, they can cause  
7 swelling. If they are generating loose pieces,  
8 they can cause mechanical locking episodes.

9 Q. So the OCD could also have caused  
10 the loose bodies?

11 MR. JOYCE: Objection.

12 THE WITNESS: It's possible.

13 Q. (By Ms. Gamache) Could the OCD  
14 lesion have caused the spurring?

15 A. Again, an OCD lesion is an injury  
16 to the bone and cartilage. The end result of  
17 that can be arthritis, and the spurs develop in  
18 response to that arthritis.

19 Q. And am I correct that there's no  
20 way to determine whether the OCD or  
21 Mr. Crowther's job duties actually caused his  
22 degenerative condition?

23 MR. JOYCE: Objection.

24 THE WITNESS: There's no way to say

Page 42

1 for absolute certainty.

2 Q. (By Ms. Gamache) And given that  
3 Mr. Crowther had an OCD lesion, or an OCD lesion  
4 was on the CT scan, it's possible that  
5 Mr. Crowther could have developed this  
6 degenerative condition having never done any  
7 manual labor; is that correct?

8 A. He could have. It appears that  
9 these types of injuries are made worse or  
10 accelerated by repetitive use.

11 Q. But he could have developed the  
12 arthritic condition in his elbow having not done  
13 the job duties that he did with the railroad?

14 A. It is possible.

15 Q. Okay. In your opinion, based  
16 simply on Mr. Crowther's elbow condition, could  
17 he have returned to work after the surgery in  
18 2009?

19 A. In large, it could have been  
20 dependent upon what type of job he was returning  
21 to. Based upon his outcome from the surgery,  
22 and those job descriptions, I believe he could  
23 have returned to work based upon his elbow  
24 alone.

Page 43

1 Q. Okay. He could return to the job  
2 duties that he was performing prior to the  
3 surgery, or prior to stopping work?

4 A. That's what I would have attempted.  
5 Now, after returning to that job, would he have  
6 had symptoms enough to come back and have new  
7 complaints, I don't know the answer to that, but  
8 I would have tried to return him to his previous  
9 job.

10 Q. Okay. So in your opinion,  
11 Mr. Crowther's surgery was successful?

12 A. I believe so.

13 Q. Have you treated Mr. Crowther since  
14 then?

15 A. I have.

16 Q. For his elbow?

17 A. No.

18 Q. Okay. Do you know if Mr. Crowther  
19 has sought any treatment for his elbow following  
20 your surgery?

21 A. I don't know the answer. He has  
22 never asked me about it, or complained to me  
23 about his elbow.

24 Q. Okay. Referring again to your

Page 44

1 record dated January 19th, 2009.

2 A. Yes.

3 Q. In the "Impression" section of that  
4 note, you indicate, "We discussed whether or not  
5 we could manage his symptoms with an  
6 intra-articular injection, which may be  
7 temporary, but might be helpful."

8 A. Yes.

9 Q. In your opinion, could he have  
10 obtained the same results having not undergone  
11 surgery?

12 A. No.

13 Q. What results may he have obtained  
14 without undergoing surgery?

15 A. Well, associated with his arthritis,  
16 there's often swelling and discomfort, and an  
17 intra-articular injection can temporarily  
18 relieve those symptoms. It would not have  
19 eliminated any mechanical symptoms associated  
20 with the loose bodies, or eliminated those to  
21 remove them.

22 Q. And if you can, is it your  
23 understanding that the mechanical symptoms or  
24 the discomfort, if one or the other was more the

Page 45

1 issue for Mr. Crowther?

2 A. I believe that the mechanical  
3 symptoms were the bigger complaint for him.

4 Q. And the mechanical symptoms were a  
5 result of the loose bodies?

6 A. Yes.

7 Q. And the loose bodies, is that also  
8 a degenerative condition?

9 A. Loose bodies are not always present  
10 in degenerative arthritis, but they are often a  
11 component of it, yes.

12 Q. Is it possible to have loose  
13 bodies and not have a degenerative condition?

14 A. Theoretically, I don't know whether  
15 I've ever seen one without the other.

16 Q. And other than non-use, is there  
17 any way to prevent degenerative conditions?

18 A. No.

19 Q. So it's possible that anyone can  
20 develop a degenerative condition in their elbow?

21 A. It is possible. Again, elbow  
22 arthritis is relatively uncommon.

23 MS. GAMACHE: I think that's all I  
24 have.

Page 46

1 CERTIFICATE OF COURT REPORTER

2 I, Michele L. Mariani, Certified Shorthand

3 Reporter, do certify that the deposition of

4 DR. MARTIN J. LUBER, in the matter of CROWTHER

5 V. CSX TRANSPORTATION, ET AL., on the 24th day

6 of May, 2010, was stenographically recorded by

7 me; that the witness provided satisfactory

8 evidence of identification, as prescribed by

9 Executive Order 455 (03-13) issued by the

10 Governor of the Commonwealth of Massachusetts,

11 before being sworn by me, a Notary Public in and

12 for the Commonwealth of Massachusetts; that the

13 transcript produced by me is a true and accurate

14 record of the proceedings to the best of my

15 ability; that I am neither counsel for, related

16 to, nor employed by any of the parties to the

17 above action; and further, that I am not a

18 relative or employee of any attorney or counsel

19 employed by the parties thereto, nor financially

20 or otherwise interested in the outcome of the

21 action.

22

23 MAY 26, 2010 \_\_\_\_\_

24 Michele L. Mariani, CSR

Page 48

1 MR. JOYCE: That's it, Dr. Luber,  
2 you're all done.

3 MS. GAMACHE: Thank you,  
4 Dr. Luber.

5  
6 (Deposition concluded at 6:25 p.m.)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

Page 47